



May 12, 2008

Standing Committee on Transport, Infrastructure and Communities  
c/o Maxime Ricard, Clerk of the Committee  
via email: [TRAN@parl.gc.ca](mailto:TRAN@parl.gc.ca)

**Re: *Navigable Waters Protection Act*, proposed amendments**

Dear M. Ricard,

Please find enclosed Lake Ontario Waterkeeper's comments on the above-mentioned matter.

If you have any questions or comments, please do not hesitate to contact me at any time:  
(416) 861-1237.

Yours truly,

Mark Mattson

Waterkeeper & President

**600 Bay Street, Suite 410. Toronto, ON M5G 1M6**

T 416-861-1237 ADMIN@WATERKEEPER.CA WWW.WATERKEEPER.CA  
PROUD MEMBER OF WATERKEEPER ALLIANCE

## EXECUTIVE SUMMARY

On April 17, 2008, Waterkeeper received an invitation from Mr. Mervin Tweed, Chair of the Standing Committee on Transport, Infrastructure and Communities, to provide a submission regarding proposed amendments to the *Navigable Waters Protection Act*. A list of seven proposed changes was included in the letter; it is our understanding that Mr. Tweed wishes to know which of these changes could be dealt with in an expeditious manner. To our knowledge, no actual draft amendments or legislation have been presented at this time.

In this submission, Lake Ontario Waterkeeper suggests that four of the seven proposed amendments may not require further study and could be dealt with expeditiously: namely, updating fines, wreck convention provisions, inspection powers, and five-year reviews.

Lake Ontario Waterkeeper further suggests that three of the seven proposed amendments may have significant impacts on free passage and the protection of navigable waterways in Canada and should not be pursued without further consultation and study: namely, amending the definitions of “navigable waters” and “work”, as well as removing the four named works from the *Act*.

## BACKGROUND

The common right to free passage on public waterways dates back more than 2500 years (Caponera, 1992, p. 33-40). This right can be traced from Roman times, through such influential documents as the *Magna Carta* of 1215 and to modern day. Canada’s *Navigable Waters Protection Act* recognizes the public right to navigation in Canadian waters; passed in 1882, it is one of our oldest pieces of federal legislation (Transport Canada).

The *Navigable Waters Protection Act* recognizes the importance of protecting navigable waterways. The *Act* does, however, allow individuals and agencies to proceed with projects that interfere substantially with navigation, provided they obtain approval from the Minister. In this sense, the *Act* both reinforces the historic common right to navigation for Canadians and creates a legal process for limiting or interfering with this right.

The act of obtaining approval from the Minister triggers a federal environmental assessment process. Through this process, environmental impacts and mitigation measures are determined. This assessment process helps to balance the traditional common right to free passage and the need or desire to construct works on or near navigable waterways. At times, a project that requires permission under the *Act* may also require permission from agencies concerned with fisheries, financing or other areas of federal concern.

On April 17, 2008, Waterkeeper received an invitation from Mr. Mervin Tweed, Chair of the Standing Committee on Transport, Infrastructure and Communities, to provide a submission regarding proposed amendments to the *Navigable Waters Protection Act*. A list of seven proposed changes was included in the letter; it is our understanding that Mr. Tweed wishes to know which of these changes could be dealt with in an expeditious manner. To our knowledge, no actual draft amendments or legislation have been presented at this time. Lake Ontario Waterkeeper offers the following commentary and recommendations in response to Mr. Tweed's request.

## COMMENTARY

### Proposal #1: Amend the definition of “navigable waters” to exclude “minor waters”

According to Transport Canada (2007, slide 5), “navigable” is defined as, “any body of water which is capable, in its natural state, of being navigated by floating vessels of any description for any purpose of transportation, recreation or commerce, and includes a canal or any other body of water created or altered for public use, as a result of the construction of any work.”

It is not desirable to exclude “minor waters” from this definition for two reasons:

**First, such an amendment is unnecessary.** The *Act* applies only to those waters that are navigable. Waters that might be considered “minor” from the perspective of navigation (i.e., non-navigable waters) are, by definition, already excluded.

**Second, such an amendment could undermine the very purpose of the *Act*.** In the event that this amendment seeks to exclude certain navigable waterways from the protections of the *Act*, the very purpose of the *Act* itself changes. No longer would the

*Navigable Waters Protection Act* protect all navigable waterways in Canada; rather, the *Act* would protect only some waterways and thus only some communities' right to free passage. If the Government of Canada is proposing to limit a public right that is older than the country itself, Waterkeeper respectfully submits that significant public consultation and study be conducted. In particular, Waterkeeper recommends that clarity be sought regarding the new status of the common law right to free passage.

## **Proposal #2: Amend the definition of “work” to explicitly exclude “minor works”**

The current definition of “work” includes:

- (a) any bridge, boom, dam, wharf, dock, pier, tunnel or pipe and the approaches or other works necessary or appurtenant thereto,
- (b) any dumping of fill or excavation of materials from the bed of a navigable water,
- (c) any telegraph or power cable or wire, or
- (d) any structure, device or thing, whether similar in character to anything referred to in this definition or not, that may interfere with navigation. (Section 3)

Waterkeeper submits that the definition and/or exclusion of “minor works” is unnecessary, given that the current *Act* does not apply to works that do not interfere substantially with navigation (Section 5.(2)). Only those works that interfere substantially with navigation are required to receive approval by the Minister (and complete the environmental assessment process). Thus, the existing exception allows for an appropriate level of regulatory efficiency regarding minor works.

## **Proposal #3: Remove the four named works from the Act**

The *Act* requires that four “named works” receive Ministerial approval in every case: bridges, booms, dams and causeways. Section 5.(2) implies that these works will always interfere substantially with navigation and does not allow the Minister to allow such works to proceed without undergoing the approvals process.

It is proposed that these four named works be removed from the *Act* and that the Minister be granted the same power of discretion that applies to other works: that is to say, if the project is not expected to interfere substantially with navigation, approval may not be required.

It is not desirable to remove these four named works from the *Act* on the grounds that they pose significant threats to free passage and should always require thorough scrutiny.

Removing these four named works from the *Act* shifts the onus to the community to prove the impacts of the proposed works and defend their own right to navigation. This creates a significant barrier to justice and undermines the purpose of the *Act*.

#### **Proposal #4: Update current fine range**

Waterkeeper recognizes that the current fine range of \$500-\$5,000 does not create a meaningful deterrent. Given the similarities between navigable waters and fisheries issues, the Committee may wish to adopt the same offence and punishment provisions set out in the *Fisheries Act*, s. 78. This change does not appear to be an area requiring further study and could be dealt with in an expeditious manner.

#### **Proposal #5: Insert the operational elements of the wreck removal convention**

Wreck removal in the context of this *Act* is not an area of concern to Lake Ontario Waterkeeper.

#### **Proposal #6: Insert explicit inspection powers**

Waterkeeper recognizes that the *Act*'s lack of explicit inspection powers creates enforcement and deterrence concerns. This is particularly important in light of the *Act*'s connection to the environmental assessment and approvals process. Waterkeeper recognizes the need for such powers and suggests it could be dealt with in an expeditious manner.

#### **Proposal #7: Insert a five-year review clause**

Waterkeeper recognizes the value of predictable, public review opportunities. This change does not appear to be an area requiring further study and could be dealt with in an expeditious manner.

#### **General Commentary: Amendments are the wrong solution**

A number of concerns and considerations have been raised by Transport Canada, especially with regards to the need for proposed amendments #1-3. In response to Transport Canada's concerns, Waterkeeper respectfully submits that legislative amendments may not be an appropriate or effective solution.

#### **Amendments will not further regulatory efficiency**

Transport Canada raised a number of concerns regarding regulatory inefficiency. First, the need to obtain approval under the *Act* is seen as an impediment to infrastructure investment through the Building Canada Fund (Canada, March 2008, 1105, Ms. Scharf speaking). The suggestion that the environmental assessment trigger results in delays is misleading; federally funding for an undertaking is also an environmental assessment trigger. Even if the work is exempt under the *Act*, an environmental assessment will still be required. Similarly, harmful alteration of fish habitat is an environmental assessment trigger and often occurs when works are constructed in or near navigable waters.

For these reasons, amending the *Act* to escape the environmental assessment trigger will not necessarily result in regulatory efficiency. Furthermore, the desire for efficiency must be balanced by the need to protect the common right to free passage. Efficiency, while laudable, is not the only goal for the regulatory process and not the only benchmark of effective governance.

#### **Amendments will not solve policy concerns**

Transport Canada raised a number of concerns regarding limited and strained resources, as well as minimal compliance monitoring and enforcement capability (see for example, Transport Canada, 2007, slide 12). Ms. Scharf (Canada, March 2008, 1110) reported to the Committee that, “there are also delays in getting input from the NWPA officials during the Canadian Environmental Assessment Act review and in issuing an NWPA authorization following the Canadian Environmental Assessment Act review and approval.”

Waterkeeper submits that these concerns, however legitimate, do not stem from flaws with the *Act* itself. Thus, it is not clear how changing the law and limiting a common right will address these concerns. In this sense, modifying the *Act* in response to policy concerns may be the wrong solution.

#### **Amendments will not address increasing conflicts**

Transport Canada suggests that there are new and expanded waterway uses including waterfront property development, recreational boating, aquaculture, demand for more energy and raw materials, and increasingly remote projects (2007, slide 11). These increasing demands, according to Transport Canada, are outgrowing the agency’s resources. Again, Waterkeeper submits that amending the legislation and limiting the common right of navigation is not an appropriate response to the gap between demand for service and resources. If anything, the Government of Canada should meet increasing



demand for water with increasing vigilance. It is precisely at such times that the public's rights are most threatened.

## RECOMMENDATIONS

In light of the above commentary, Lake Ontario Waterkeeper submits the following recommendations:

1. If desired, proceed with the legislative amendment process for proposals 4-7.
2. If changes are desired regarding proposals 1-3, engage in a public consultation process, including outreach to nonprofit organizations and the academic community.
3. Ensure that, as a guiding principle, recognition of the public's right to free passage remains the primary purpose of the *Navigable Waters Protection Act*.

**600 Bay Street, Suite 410. Toronto, ON M5G 1M6**

**T 416-861-1237** [ADMIN@WATERKEEPER.CA](mailto:ADMIN@WATERKEEPER.CA) [WWW.WATERKEEPER.CA](http://WWW.WATERKEEPER.CA)  
PROUD MEMBER OF WATERKEEPER ALLIANCE

## REFERENCES

Canada, House of Commons, Official Report of Standing Committee on Transport, Infrastructure and Communities (*Hansard*), 016, March 11, 2008.

Caponera, Dante A. (1992). *Principles of Water Law and Administration: National and International*. Taylor & Francis.

Transport Canada. (n.d.) *Marine Transport - Navigable Waters Protection Act*. Last updated June 22, 2007. Retrieved online May 11, 2008: <http://www.tc.gc.ca/quebec/en/nwp/menu.htm>

Transport Canada (March 8, 2007). *The Navigable Waters Protection Act Regulatory Inefficiency - A Prime Example*. Presentation to NRCan Regulatory Efficiency Workshop. Ottawa.

Tweed, Mervin. Chair, Standing Committee on Transport, Infrastructure and Communities. (March 2008). Correspondence to stakeholders.